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January 29, 1998

MEDIA ACCESS PROJECT

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JAN 29 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman-Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

*Re:* Notice of *Ex Parte* Presentation in MM Docket No. 93-25

Dear Ms. Salas:

Earlier today, Gigi B. Sohn, Executive Director of the Media Access Project (MAP) and MAP's law student intern, Daria Williams, met with Deputy International Bureau Chief Rosalee Chiara and Marcelino Ford-Levine, Counsel for New Media Policy in the Office of Plans and Policy, to discuss the Commission's pending action in the above docket.

The purpose of the meeting was to discuss possible future Commission actions to implement Section 25(a) of the 1992 Cable Act. Ms. Sohn discussed the Commission's authority under that Section to impose certain public interest obligations on DBS providers.

Ms. Sohn also briefly discussed the mandate of Section 25(b) which prohibits DBS providers from having "any editorial control" over programming transmitted on a reservation of channel capacity for "noncommercial, educational or informational programming." In conjunction with that discussion, Ms. Sohn gave Ms. Chiara and Mr. Ford-Levine copies of two Commission decisions, which are attached to this letter. The decisions are *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 998 (1993) and *Leased Commercial Access*, 12 FCC Rcd 5267 (1997) (pages 5267, 5316-5317 only).

An original and three copies of this letter are being filed with your office today.

Sincerely,

Gigi B. Sohn
Executive Director

cc. Rosalee Chiara
Marcelino Ford-Levine

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| | ) | |
| Implementation of Sections of the | ) | |
| Cable Television Consumer Protection | ) | CS Docket No. 96-60 |
| and Competition Act of 1992: | ) | |
| | ) | |
| | ) | |
| | ) | |
| Leased Commercial Access | ) | |

# SECOND REPORT AND ORDER AND SECOND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

**Adopted: January 31, 1997** **Released: February 4, 1997**

By the Commission:

## Table of Contents

## H. Selection of Leased Access Programmers

### *1. Background*

98. In the *Further Notice,* the Commission proposed rules to govern a cable operator's selection of leased access programmers.[254] We tentatively concluded that an operator should be required to select leased access programmers on a first-come, first-served basis as long as the operator's available leased access capacity is sufficient to accommodate all incoming requests.[255] We sought comment on whether an operator should be allowed to accept leased access programmers on any other basis if its system's available leased access capacity is insufficient to accommodate all pending requests.[256] Specifically, we noted that where demand for leased access channels exceeds the available supply, it may be appropriate to allow an operator to make content-neutral selections in order to avoid situations that could "adversely affect the operation, financial condition, or market development of the cable system."[257] We asked whether it would be appropriate, when two or more leased access programmers simultaneously demand the last available leased access space, to allow the cable operator to select a leased access programmer based on the amount of time requested (e.g., a full-time request versus a part-time request).[258] We also sought comment on whether operators should be permitted to base their selections on any content-neutral criteria other than the amount of time requested by the programmers.[259]

### *2. Discussion*

99. We conclude that, so long as an operator's available leased access capacity is sufficient to satisfy the current demand for leased access, all leased access requests must be accommodated as expeditiously as possible, unless the operator refuses to transmit the programming because it contains obscenity or indecency.[260] We believe that such an approach is the most appropriate method of assuring that cable operators comply with Section 612(c)(2),

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[254] *Further Notice* at paras. 127-29.

[255] *Id.* at para. 128.

[256] *Id.*

[257] *Id.* (quoting Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1)).

[258] *Id.* at para. 129.

[259] *Id.*

[260] *See* Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

which explicitly restricts operators' exercise of editorial control over leased access programming.[261] Section 612(c)(2) provides that "a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming," except in the case of programming containing obscenity or indecency, or to the minimum extent necessary to set a reasonable price.[262] We believe that requiring operators to accommodate all leased access requests when the programming does not contain obscenity or indecency, so long as there is available capacity, will most effectively restrict operators' exercise of editorial control, without impinging upon their discretion with regard to price and sexually-oriented programming. We also believe that such an approach will further the statutory objective to promote competition because it will reduce an operator's ability to select leased access programming based on anti-competitive motives.

100. We believe, however, that an operator should be allowed to make objective, content-neutral selections from among leased access programmers when the operator's available leased access channel capacity is insufficient to accommodate all pending leased access requests.[263] In the full-time channel context, this situation would arise if two or more leased access programmers requested the remaining available leased access space; in the part-time context, this situation could arise, for example, if two or more programmers requested the 8:00 p.m. to 9:00 p.m. time slot on the system's part-time leased access channel. In such situations, we believe that the cable operator should be allowed to make an objective, content-neutral selection among the competing programmers. For example, the operator could hold a lottery.[264] Or, the operator could base its decision on other objective, content-neutral criteria such as a programmer's non-profit status,[265] the amount of time a programmer is willing to lease,[266] or a programmer's willingness to pay the highest reasonable price for the capacity at issue.[267]

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[261] *Id.* The record reflects that many commenters are in favor of controlling an operator's selection of leased access programming through some variation of a first-come, first-served approach. *See* Asiavision Comments at 1; CME, et al. Comments at 25; Game Show Network Comments at 23-26; Intermedia/Armstrong Comments at 13-14; Telemiami Comments at 22; ValueVision Comments at 13-14; Viacom Comments at 13. *But see* NCTA Comments at 31-32; Outdoor Life, et al. Comments at 37; TCI Comments at 36-37; Daniels, et al. Reply at 10.

[262] Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

[263] *Further Notice* at para. 128.

[264] *See* Visual Media Comments at 7; CME, et al. Comments at 25.

[265] *See, e.g.*, CME, et al. Comments at 25-26.

[266] Several commenters support a preference for full-time programmers or programmers requesting the greatest total usage of channel capacity. *See* A&E, et al. Comments at 59-60; Lorilei Comments at 15; Outdoor Life, et al. Comments at 37.

[267] *But see* Viacom Comments at 13.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-258**

In the Matter of

Implementation of Section 10 of the
Cable Consumer Protection and
Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

## FIRST REPORT AND ORDER

**Adopted: February 1, 1993; Released: February 3, 1993**

By the Commission: Commissioner Marshall not participating.

## I. INTRODUCTION

1. Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub.L. No. 102-385, permits cable operators to enforce voluntarily a written and published policy of prohibiting indecent programming on commercial leased access channels on their systems.[1] Section 10(b) of the Act requires the Commission to adopt regulations that are designed to restrict access of children to indecent programming on leased access channels (that is not voluntarily prohibited under section 10(a)) by requiring cable operators to place indecent leased access programming, as identified by program providers, on a "blocked" leased access channel. On November 5, 1992, the Commission adopted a *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 7709 (1992), seeking comment on implementation of section 10(b) and related matters. This *Report and Order* adopts rules and regulations that implement section 10(b) of the Act and clarifies other aspects of section 10 related thereto.[2]

2. In the following paragraphs, we discuss the major issues raised by the comments and our conclusions with respect to those issues.[3] Before turning to specifics relating to the statute's implementation, we shall first address the general comments directed to the constitutionality of section 10 and to the adequacy of our *Notice* under the requirements of the Administrative Procedure Act, 5 U.S.C. §553.

## II. SECTION 10's CONSTITUTIONALITY

3. Many commenters challenge the constitutional validity of section 10 of the Cable Act. Alliance, for example, challenges the constitutionality of both section 10 and the Commission's proposed rule seeking to implement the section. Alliance believes that the statute is unconstitutional because it impermissibly restricts the first amendment rights of access programmers. Restrictions on indecent programming, according to Alliance, may not be applied to cable, unlike other media such as broadcasting, because cable subscribers are not "captive audiences" and, through cable technology, such subscribers have greater control over programming and information services than do either broadcast viewers and listeners or telephone subscribers. According to Alliance, the statute and proposed rule are constitutionally infirm because the lockbox approach, rather than blocking, is the least restrictive means to achieve the government's purported aims.[4] Finally, Alliance argues that the statute cannot be justified as necessary since it is underinclusive and does not affect indecent programming on channels other than those used for leased access.[5]

4. Many access organizations filed comments in support of Alliance's comments, although these groups' comments were primarily focused on section 10(c)'s provisions applicable to the public, educational, and governmental access channels. Cable operators, in turn, maintain that section 10 is unconstitutional as to them. For example, Cox Cable maintains that section 10(a) impermissibly "deputizes" cable operators as censors. Operators also assert that other provisions of the new Cable Act and of the 1984 Cable Act (upon which section 10's requirements rest) are constitutionally infirm because, *inter alia*, they impermissibly restrict cable operators' first amendment rights.[6]

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[1] Section 10(a) is self-effectuating and became effective December 4, 1992.

[2] The *Notice* also requested comment on regulations to implement Section 10(c) of the Act, relating to cable operator-imposed restrictions on obscene and other types of program materials on the public, educational, and governmental access channels. We shall adopt regulations that implement section 10(c) in a subsequent *Report and Order*.

[3] We received comments, informal comments, reply comments, and informal reply comments. Those comments or reply comments filed after the prescribed deadlines shall be treated as informal comments. A list of all the commenters in this proceeding is provided in Appendix A.

[4] As described in section 624(d)(2) of the Communications Act, a "lockbox" or parental key is a device that enables subscribers to prevent viewing of particular cable services within their homes during periods selected by them.

[5] Alliance also challenges the constitutionality of section 10(c) of the Act because, *inter alia*, it allows cable operators, if they choose, to ban programming containing sexually explicit materials and materials soliciting or promoting unlawful conduct even though such materials are protected non-obscene materials and even though they may not be indecent. As noted above, matters directly pertaining to section 10(c) shall be addressed at a later date.

[6] This view is advanced by many cable operators, e.g., TCI and Time Warner, and by both cable trade associations, NCTA and CATA. We do not address the constitutionality of other parts of the new cable Act as they are not directly at issue here and are not properly within the scope of the *Notice*.

**Discussion**

5. The courts have expressly recognized that activities of cable operators are affected with first amendment interests. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-495 (1986). Congress, aware of the authority on this subject, has concluded that the provisions in section 10 governing cable activities are legally permissible. We are obligated to execute and enforce the provisions of section 10(b) of the Act as enacted by Congress.[7]

6. Moreover, we believe the constitutional challenges raised by the commenters are without merit. In *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), the Supreme Court, in upholding a ban on obscene telephonic communications but striking down a complete prohibition on indecent telephonic communications, expressly stated that "[t]he Government may [] regulate the content of constitutionally protected [indecent] speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." As discussed below, we believe these principles are fully applicable to indecent programming on cable television and that the regulations we adopt to implement section 10 satisfy these requirements.

7. At the outset, it is evident that a compelling state interest underlies section 10 and the implementing regulations. The compelling interest under section 10 is to reduce children's exposure to indecent materials.[8] The Supreme Court has unequivocally stated that the government's "interest in safeguarding the physical and psychological well-being of a minor' is compelling,'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (*quoting Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), and that "[t]his interest extends to shielding minors from the influence of [material] that is not obscene by adult standards," *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978). In addition, as discussed below, Section 10(b) and our regulations implementing the blocking approach prescribed by Congress therein are the least restrictive means necessary to limit children's access to such programming.

**Permissibility of Regulating *In decent Cable Programming***

8. A principal attack raised by commenters as to why the blocking approach in section 10(b) is impermissible is that the characteristics of cable distinguish it from certain other media in which regulation of indecent material has been upheld. According to the commenters, the courts have concluded that cable's differing characteristics preclude all government regulation of indecent programming on the cable medium. More particularly, they point out that regulation of indecent programming has been justified in the broadcast context primarily on grounds that broadcasting is a "uniquely pervasive" medium in society and "uniquely accessible to children,"[9] whereas some federal courts have found that these characteristics do not apply to cable television.[10]

9. We note that each of the federal court cases cited by the parties invalidated state or local laws or ordinances that attempted to impose *complete* bans on indecent programming on cable systems. Section 10(b), in contrast, does not ban such programming but merely requires that indecent programming on leased access be placed on a single channel so that unrestricted access by children can be prevented. It does not in any way unduly prevent adults from viewing indecent cable programming. In addition, in each of the cited cases, the state or local prohibitions were found to be overly broad in terms of the content sought to be restricted and thus stand in stark contrast to the narrow definition of indecency we have proposed and shall adopt today.[11]

10. These cited cases were also decided prior to Supreme Court's decision in *Sable Communications v. FCC*, 492 U.S. 115 (1989), which clearly indicates that regulation of indecent speech is permissible even though the medium is not broadcasting and, therefore, does not necessarily fit the exact blueprint the Supreme Court applied in *Pacifica* to broadcasting. Thus, the Court has not concluded -- or even suggested -- that indecency regulations, similar to those applied to the telephone medium, cannot be constitutionally applied to cable television. As *Sable* and its progeny indicate,[12] regulation of indecent matter on other forms of expression is constitutionally permissible provided that it meets the "compelling government interest" test and is "carefully tailored."

11. Further, those federal decisionsthat have invalidated indecency prohibitions on cable have rested in part on the premise that "cable is not an intruder" into the home, but rather "an invitee whose invitation can be carefully circumscribed," e.g., by lockboxes. *See Community Television of Utah, Inc.*, 611 F.Supp. at 1113. These decisions thus do not suggest that the government is precluded from imposing regulations that are intended merely to enable customers to "tailor the invitation" even more carefully -- such as by blocking mechanisms designed to protect children in the home. Finally, even though cable is not now the universal service the telephone medium is, nor, as yet, as pervasive as broadcasting in our society, we note that over 60 percent of television households in this country now subscribe to cable.[13] As pointed out by

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[7] It is awell-rooted principle of law that "regulatory agencies are not free to declare an act of Congress unconstitutional." *See Meredith Corp. v. FCC*, 258 U.S.App.D.C. 22, 31 (D.C. Cir. 1987); *also Johnson v. Robinson*, 415 U.S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies").

[8] Section 10(b) expressly commands the Commission to promulgate blocking regulations that are "designed to limit the access of children to indecent programming."

[9] *See FCC v.Pacifica Foundation*, 438 U.S. 726, 748-749 (1978).

[10] *See Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Wilkinson*, 611 F.Supp. 1099 (D. Utah 1985), *aff'd per curiam* 800 F.2d 989 (10th Cir. 1986); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D. Utah 1982).

[11] *See also Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982) (statute prohibiting distribution by wire or cable any pornographic or indecent material to subscribers held unconstitutionally overbroad).

[12] *See Dial Information Services v. Thornburg*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 966 (1992) and *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

[13] Cable television is available nationwide to 89.4 million

Alliance, approximately 30 million of these homes are provided with an access channel. These figures will undoubtedly increase in the years to come. It would thus seem that blocking is a reasonable, appropriate means to protect the well-being of children in the substantial number of households that now subscribe to cable services. In our view, therefore, the decisions cited by the commenters do not render section 10(b) blocking *per se* unconstitutional.

**Least Restrictive Means**

12. The other principal attack raised by the parties is that even if government regulation of indecent programming on cable television is permissible, "blocking" as required under the statute is not the least restrictive means to achieve the government's compelling interest. Instead, in these commenters' view, the least restrictive and more effective means would be the existing lockbox approach authorized by Congress in section 624 of the Communications Act, which does not require that programming be identified by a program provider as indecent and placed on a single blocked channel. They believe that without record evidence that lockboxes are ineffective, other blocking mechanisms, alleged as more restrictive, cannot be adopted.

13. At the outset, we note that in *Dial Information Services v. Thornburg*, 938 F.2d 1535 (2nd Cir. 1991), *cert. denied* 112 S. Ct. 966 (1992), the court expressly held that "blocking" mechanisms authorized by section 223 and implemented by the Commission were the least restrictive means to achieve the government's compelling interest to reduce children's access to indecent communications on the telephone medium. In that case, the court reversed the district court because it had erred "in focusing on means, when the focus should be on goals as well as means" in its finding that "voluntary blocking of indecent telephonic communications was the least economically restrictive and therefore the most desirable means of regulation." *Id.* at 1542. The court emphasized that "the means must be effective in achieving the goal" and concluded that "[v]oluntary blocking simply does not do the job of shielding minors from dial-a-porn." *Id.*[14] A similar decision was reached by the federal appellate court in *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991). Moreover, the courts in these and earlier cases were fully aware that voluntary approaches, similar in principle to the lockbox approach, were available to telephone subscribers who wished to preclude the use of their phones for outgoing calls to specific numbers. The blocking approaches adopted by the Commission were nevertheless specifically sanctioned as the least restrictive effective means to achieve the government's interest.[15] The blocking scheme upheld in these cases is, in all relevant respects, identical to that required by section 10(b).[16] Thus, we have no reason to question the constitutional permissibility of requiring blocking as a means to prevent children's access to indecent materials.

14. We further note that Congress itself has not suggested that a voluntary lockbox approach is the most effective means to prevent children's access to indecent programming. Even though under the 1984 Cable Act, Congress explicitly authorized a lockbox approach to enable subscribers to control access by others within their household to programs appearing on certain cable channels, it did not rule out the possible use of other methods. It merely stated, at the time, that section 624 provides "*one method* for dealing with obscene or indecent programming," H.R. Rep No. 934, 98th Cong., 2d Sess. at 70 (1984) (emphasis added), and said that this requirement "provides *one means* to effectively restrict" access to minors and others, *id.* (emphasis added). In section 10(b) -- just as it did in section 223 relating to "dial-a-porn" telephone services -- Congress has now determined that mandatory, not voluntary, blocking is essential in effectively protecting children from indecent programming on leased access channels.

15. We agree with Congress' conclusion that the voluntary lockbox approach is not likely to be as effective as cable operator-blocked channels. Moreover, we believe it may have other drawbacks. On leased access channels, for example, programs may come from a wide variety of independent sources, with no single editor controlling their selection and presentation. As a consequence, on these channels, indecent programming may be especially likely to be shown randomly or intermittently between non-indecent programs. Subscribers would thus be required to manually install, activate, and deactivate these devices in an attempt to avoid exposure of their children to such programming, and, even if children were carefully supervised, such attempts would not always be successful.[17]

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homes. Out of a total of 92.1 million television households in the United States, there are approximately 55.7 million cable subscribers. *Broadcasting* at 79 (Jan.11, 1993).

[14] The court was explicit in its rejection of the lower court's finding:

> "Even if voluntary blocking is assumed to be the least restrictive means of accomplishing the congressional purpose, it clearly is not an effective means.

938 F.2d at 1542.h

[15] *See Dial Information Services v. Thornburg*, at 1542 ("voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company"); *Information Providers' Coalition v. FCC*, at 873 ("The Commission concluded that voluntary blocking would not be an effective means of limiting minors' access to dial-a-porn services. We are satisfied that substantial evidence supports this finding and will not disturb it on review."). *See also Carlin Communications v. FCC*, 837 F.2d 546, 546 (2d Cir. 1988) ("The Commission bore its burden of showing that the compelling government interest in protecting minors from obscene telephone messages could not be served by less restrictive means. It adequately considered the feasibility and costs of customer premises blocking equipment").

[16] Under section 10(b), the cable operator, not the cable subscriber, is required to "block" access to the leased access channel carrying indecent programming just as, under section 223, it is the telephone common carrier, not the telephone customer, that is required to "block" access to telephone lines carrying indecent dial-a-porn messages. Moreover, just as under section 223, a telephone common carrier must in essence segregate telephone lines carrying indecent telephonic messages from others, under section 10(b), cable operators are required to segregate through use of a separate channel indecent leased access programming from the non-indecent programming.

[17] As the Supreme Court stated in *Ginsberg v. New York*, 390 U.S. 629, 639 (1962), parents and others "who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid the discharge of that responsibility."

The alternative for such subscribers would be to attach the lockboxes on a permanent basis and to forbear receiving leased access programming entirely.

16. On the other hand, by separating indecent from non-indecent programming and the use of blocking mechanisms, the invitation of cable "as an invitee" can be more "carefully tailored." Subscribers can better protect their children and will not be required to forego entirely (for themselves and their children) receipt of all leased access programming simply in order to avoid possible exposure of children to indecent programming on these channels. The blocking approach thus enhances the rights of viewers to have access to leased access programming and the rights of programmers to reach their intended audiences.

17. In summary, we do not believe the blocking mechanism required by section 10(b) and incorporated in our rules, suffers from constitutional defects. Cable television, like the telephone and other services, may well be viewed as an invitee into an individual's home. Existing law, however, would not appear to preclude that invitee's invitation from being carefully tailored to ensure that the invitee does not overstep the bounds of its invitation in a harmful fashion.

**Alleged "Underinclusiveness"**

18. Alliance also contends that section 10(b) and the proposed implementing rule are unconstitutional because they affect only access channels and do not address the "entirety" of the problem of indecent programming in the cable medium. Thus, they contend, the claim that the blocking requirement is justified by a compelling interest is undermined, and, hence, the statute and rule are unconstitutional.

19. We disagree. As the Supreme Court recently has made clear, the first amendment imposes no "underinclusiveness" limitation but a "content discrimination" limitation upon the government's prohibition of proscribable speech. The purpose of the prohibition against content discrimination is to ensure that the government may not effectively drive certain ideas or viewpoints from the marketplace.[18] The section 10(b) blocking requirement, of course, does not proscribe speech at all, but merely requires that indecent programming be placed on channels that subscribers must request in order to obtain access. Thus, there is no danger that section 10(b) and our rule will drive ideas or viewpoints from the market.

20. Further, there is no basis for a conclusion that the statute is intended to protect only certain ideas or viewpoints or that official suppression of ideas is afoot.[19] Rather, Congress has determined that some restrictions on the subclass affected by the statute are justified because of the risk of harm to children from indecent programming. Congress thus has merely directed its attention to the specific area where a problem has been identified.[20] It was not required to legislate in other areas where no problem of similar degree or magnitude had been found. Given the evidence before Congress concerning the egregious nature of the problems associated with some leased access programming, legislative action was deemed appropriate.[21]

**Constitutionality of Section 10(a)**

21. In addition to challenging the constitutionality of the section 10(b) blocking approach, Alliance also asserts that section 10(a) is unconstitutional because it permits cable operators to ban completely indecent programming on leased access channels. Although Alliance recognizes that such complete bans are permissible by private parties, Alliance contends that access channels in fact are "public forums" and thus that government action has been taken that implicates the first amendment.

22. We are not aware of any federal decision, including those cited by Alliance, that have directly addressed the question or held that cable access channels are public forums as that term has been defined for the purpose of first amendment analysis. Moreover, the communications facilities and services used by cable operators to provide commercial leased access are analogous in function and purpose to those provided by communications common carriers. Similarly, we are not aware of any federal court decision that has held, upon constitutional grounds, that communications common carriers operate as public forums. To the contrary, existing case law has explicitly held that the activities of public utilities, such as telephone common carriers, do not constitute state action that would, for first amendment purposes, prohibit such carriers from engaging in content-based discrimination.[22] For similar

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[18] *See R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2545 (1992).

[19] *Id.* at 2547.

[20] Senator Helms stated that the purpose of these provisions is "to forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels," noting that "leased access channels are not pay channels, they are often in the basic cable package." 138 CONG. REC. S646 (daily ed. Jan.30 1992). Alluding to a specific example of leased access in Puerto Rico, he pointed out that "[t]he situation is likewise out of hand in New York and other States," and read from one subscriber's letter in which she described how she and her daughter were subjected to "verbal and visual violation just by accidentally pushing the wrong button" and seeing "a couple engaged in oral sex." *Id.* We also note that, to the extent cable operators themselves may provide indecent or "adult" programming, such programming is more likely than not to be provided on per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b).

[21] Congress, we note, is not prohibited from legislating restrictions directed to the most patently offensive programming, if it concludes that the risk of children's exposure to such materials is significantly greater on leased access channels than elsewhere. *Cf. R.A.V. v. City of St. Paul, Minnesota* 112 S.Ct. at 2546 (A state might choose to prohibit only that obscenity which involves the most lascivious displays of sexual activity).

[22] *See, e.g., Sable Communications v. FCC*, 492 U.S. at 131 (Scalia, J., concurring) ("[W]e do not hold that the Constitution requires public utilities to carry [dial-a-porn]"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974) (carriers are private companies, not state actors); *Information Providers' Coalition v. FCC*, 928 F.2d at 877 ("a telephone carrier may [] ban 'adult entertainment' from its network"); and *Carlin Communications v. Mountain States Telephone and Telegraph*, 827 F.2d 1291, 1297 (1987), *cert. denied*, 485 U.S. 1029 (carrier is under no constitutional restraints in its policy of barring all "adult" entertainment from its 976 network). *Carlin* also disposes of Alliance's alternative claims that a cable operator's decision to ban indecent programming constitutes state action

reasons, we do not believe that the activities of cable operators when they engage in the provision of commercial leased access can be construed as constituting state action.

23. Therefore, to the extent that Alliance and the other parties' comments are directed at the constitutionality of the statute and our implementation thereof, they are rejected.[23] As noted above, in implementing these statutory provisions, we shall to do so in a manner that best protects the constitutional interests of all concerned.

### III. Compliance with Administrative Procedure Act (5 U.S.C. § 553) Requirements

24. Alliance maintains that the rights of the public have been prejudiced because the *Notice* and/or proposed rule fails to: articulate purposes that would be served by rule; present record evidence of the existence of a problem; present its reasoning on how the alleged problem would be remedied; include a complete description of subjects and issues involved; set forth standards describing the range of alternatives being considered with reasonable specificity; set forth any certification requirement in the proposed rule or a formulation of specific procedures to resolve access disputes or the blocking mechanisms or procedures that might be adopted. Alliance states that the Commission should issue a second notice of proposed rule making and allow a second round of comment. Although not objecting to the adequacy of the *Notice*, MPAA agrees that an additional round of comment is necessary in light of the "extraordinary constitutional delicacy of the issues at hand."

25. We disagree. The Administrative Procedure Act requires an agency to give advance warning of proposed informal rulemaking by publishing a notice containing "either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). The Act, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (1980).Given the statutory constraints involved, we believe the *Notice* amply articulated the purposes intended to be served by the rule, *see* paras. 5-9 (limiting children's access to indecent programming) and provided the public an adequate description of the subjects and issues involved (*see* paras. 1-2 relating to "no censorship" and removal of cable operator immunity for obscene programming on access channels and paras. 13-14 relating to and ranging from interpretation of statutory terms to whether cable operator use of certifications would be appropriate). We believe that the *Notice* adequately set forth and elicited comment on the proposals relating to certification,[24] resolution of access disputes, and blocking mechanisms. Indeed, extensive comments on these and other issues were in fact submitted. Accordingly, we reject Alliance's arguments that the *Notice* did not comply with the APA.

### IV. Section 10(a) -- Implementation by Cable Operator of a Written and Published Policy of Prohibiting Indecent Leased Access Programming

26. Section 10(a) amends section 612(h) of the Communications Act, 47 U.S.C. §532(h), governing commercial leased access, to permit a cable operator to enforce a "written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

27. Cable operators contend that they should have broad discretion regarding the manner in which they implement section 10(a) of the Act.For example, Acton states that the operator should have broad discretion (including, for example, the right to prescreen) in selecting and enforcing its implementing policy and that a cable operator's decision should not be subject to challenge as long as its decision is based on a "reasonable belief" in accordance with the statutory language. NCTA submits that a cable operator should be able to prohibit programming under the "reasonable belief" standard if the operator's belief is based on its review of programming or the operator's receipt of certification from a programmer that the program is not indecent. CATA argues that, just as programmers are required under section 10(b) of the statute to notify the cable operator of indecent programming to be blocked, so too should they be required to notify the cable operator as to whether the program is indecent under section 10(a). TCI asserts that the absence of specificity in section 10(a) would appear to signal Congress' intent to afford cable operators' discretion to establish the form and manner of publication of their policies.

28. Denver Access, on the other hand, is concerned that too much leeway provided under section 10(a) will cause cable operators to curtail leased access programming because no standard of reasonableness is required for removal or attachment of conditions to leased access services. Indeed, Denver emphasizes that the self-effectuating provisions of section 10 (and presumably, how they are interpreted and/or enforced) are crucial to leased access program providers and, therefore, the Commission's role in overseeing this part of the statute is vital.

#### Discussion

29. We are convinced by the language of section 10(a), especially when read in conjunction with section 10 as a whole, that Congress intended to provide cable operators wide discretion to determine the manner in which they

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or an unlawful prior restraint simply because the cable operator potentially could face liability if it carries obscene programming. *See id.* at 1297 n.6 (the pressure of an obscenity law and resulting self censorship is not an unlawful prior restraint).

[23] Alliance and others also challenge the constitutionality of specific aspects of the statute or our implementation of them. We shall address these arguments below in the context of the specific provisions and requirements of the statute.

[24] The fact that certification is discussed in the *Notice* as a possible option but is not reflected in the proposed rule appended to the *Notice* does not, contrary to Alliance'sassertions, render the rulemaking proceeding invalid.

may enforce a policy of prohibiting indecent leased access programming, without involvement by this Commission. Section 10(a) expressly states that a cable operator's determination to classify programming as indecent should be based on the operator's "reasonable belief," thereby according the operator wide discretion. Furthermore, in conspicuous contrast to both sections 10(b) and (c), section 10(a) does not require, or grant specific authority to, the Commission to implement its provisions.

30. Moreover, it is clear that Congress did not wish under section 10(a) to compel cable operators to serve as government surrogates' and prohibit this type of programming on leased access channels. This is evident from the legislative history of the provision, which reveals Congress' explicit intention to ensure that the imposition of any such prohibition by cable operators would be voluntary, not mandatory, and its concern that cable operators not be compelled to act as involuntary government surrogates.[25] The legislative history thus makes clear that cable operators are free to decide whether to prohibit indecent programming on these channels -- the very same freedom they enjoy with respect to the other channels not subject to access requirements.

31. Cable operators thus need not prohibit indecent programming but are free to ban such programming on their leased access channels as long as they have a written and published policy and, in enforcing any such prohibition, exercise their reasonable belief about which programming is or is not indecent. Section 10(a) would also appear to permit cable operators to adopt any measures appropriate for implementation including, but not limited to, the requirements we adopt under section 10(b), subject to the caveat in section 612(c)(2) that prohibits them from exercising editorial control over leased access programming in any other respects.[26] Further, some cable operators suggest that cable operators have the discretion to prohibit some, but not necessarily all, indecent programming under section 10(a) as long as they block the rest under section 10(b). Given the wide discretion Congress afforded cable operators under this section, we see no reason to dispute this interpretation.[27] Because Congress appears to have deliberately omitted any role for the Commission in the implementation of this particular provision of section 10 and because programmers are otherwise allowed, under existing statutory provisions, to enforce their rights to commercial leased access in federal district courts,[28] we conclude that the courts, rather than this agency, are the appropriate forums for resolution of any disputes concerning whether cable operators have properly denied access pursuant to section 10(a).

## V. Section 10(b)--Implementation of Blocking Requirement Applicable to Indecent Programming

32. Section 10(b) amends section 612 of the Communications Act of 1934 (47 U.S.C. §532) by adding new subsection (j)(1) which requires the Commission to promulgate regulations designed to: limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by --

> (A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;
>
> (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and
>
> (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

Subsection (j)(2) requires cable operators to "comply with the regulations promulgated pursuant to paragraph (1)." Thus, this provision requires cable operators to place indecent programming, as defined by the Commission, and as identified by program providers, on a single channel and to block access to this channel unless the subscriber affirmatively requests access to the channel in writing. In the paragraphs below, we discuss implementation of the various components of this provision.[29]

### A. Definition of "Indecent Programming"

33. Congress set forth in section 10(a) a definition of indecency to be used by cable operators that voluntarily choose to prohibit indecent programming on the leased access channels. The statutory definition is virtually identical to the Commission's generic definition of indecency and differs only insofar as we have tailored the definition to the particular medium involved.[30] In the *Notice*, we pointed out that, unlike in section 10(a), Congress in section 10(b) delegated to the Commission the

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[25] Senator Helms, author of this amendment, emphasized that cable operators' actions prohibiting indecent material on leased access channels "is not governmental action" but rather "action taken by a private party." 138 CONG. REC S646 (Remarks of Senator Helms daily ed. Jan.30, 1991). He further pointed out that the "pending amendment merely gives cable operators the legal right to make that decision" but "does not require cable operators to do anything." *Id.* Even though the view of a sponsor of legislation is by no means conclusive, the Supreme Court has indicated that it is entitled to considerable weight, particularly in the absence of a committee report. *North Haven Board of Education v. Bell*, 451 U.S. 512, 526-527 (1982).

[26] Thus, a cable operator who makes its written policy available to users on request, places it in its public file, and furnishes it to the franchise authority would appear to satisfy the requirement of having a "written and published policy," as Blade Communications suggests. Similarly, this provision would not appear to preclude cable operator reliance upon a user's certification as the basis for its "reasonable belief," as NCTA suggests. *See* discussion at para. 50 and note 42, *infra*.

[27] *See also* para. 43, note 39, *infra*.

[28] *See also* subsections 612(d) and (e)(1).

[29] Many of the parties submitted comments concerning which persons or entities should be required to bear the costs and expenses under the cable operator-imposed policy under section 10(a) as well as those costs and expenses arising from implementation of blocking mechanisms under section 10(b). We believe these issues are more appropriately addressed in the cable rate regulation proceeding in *Notice of Proposed Rulemaking in MM Docket No. 92-266*, FCC 92-544 (adopted December 10, 1992; released December 24, 1992), and thus will be taken up therein.

[30] Senator Helms, author of section 10(a), pointed out that "[t]his definition is exactly the same as the FCC definition." 138 CONG. REC. S646 (Remarks of Senator Helms daily ed.

task of defining an indecency standard for programming that programmers must identify and cable operators must block.

34. We proposed, for the purpose of implementing section 10(b), to use the definitional language of section 10(a) -- i.e., indecent programming would be defined as programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." We noted that this language is patterned after the generic definition of indecency found in the standards we have applied to broadcasting and the telephone medium.[31] Just as we have previously tailored our indecency standard to the specific medium involved, we asked whether we should make the definition specifically applicable to the "cable medium."

35. Many of the commenters state that, if the Commission decides that an indecency standard is applicable to cable, the Commission's proposed definition would be appropriate since it would comport with the indecency definition in section 10(a) and parallels the Commission's other indecency definitions. This is particularly important, according to NCTA, because, if the Commission's definition under section 10(b) were broader than that under section 10(a), then the cable operator would be in the "untenable" position of being forced to block programming which it is not able to prohibit under section 10(a).

36. In addition, NCTA and others believe that the Commission should tailor its standard to the "cable medium" because such a step would minimize difficulties by giving the term a narrow definition. Relating to this question, Blade Communications states that the definition should be refined by stating that the relevant community for cable should be cable subscribers and, indeed, further suggests that the definition should be further refined to subscribers of a particular tier or channel. Time advocates adoption of a community standard that is based on the "average cable subscriber" on a nationwide basis, as the Commission has done on the broadcast side. In addition, it states that material should be judged within the context of the whole program and that merit of the work should be considered. Intermedia states that if the Commission is to make the definition workable, it must establish a national standard that preempts state prosecution of programmers and operators. Many of the reply commenters reiterate the importance of adopting a nationwide standard based on the "average cable subscriber."

**Discussion**

37. We shall adopt our proposed definition of indecent programming. As we pointed out in the *Notice*, the Supreme Court stated in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978), that "each medium of expression presents special First Amendment problems." Our definition thus shall be suitably tailored to include reference to the cable medium, just as our generic definition has been adjusted to other media. In addition, we agree with Time that the standard should be based on the "average cable subscriber,"[32] just as our indecency standard for broadcasting is based on the "average broadcast viewer or listener."[33] In addition, for purposes of our definition, "average cable subscriber" shall mean the "average subscriber to cable television," rather than the average subscriber to a particular cable system or average subscriber in a particular locality."[34] Keeping in mind that the purpose of "indecency" regulation is to protect children from exposure to such materials, we believe that this interpretation, not confined to a specific geographical area or specific cable system, is reasonable and appropriate.[35]

38. We do not agree that any determination of indecency made under the standard is required take into account the work as a whole. As the court in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) stated, "some material that has significant social value may contain language and descriptions as offensive . . . as material lacking such value." Thus, while "merit is a relevant factor in determining whether material is patently offensive," it "does not render such material *per se* not indecent," since the object sought is to reduce the risk of children's exposure to such materials. *Id.* Of course, as we have reiterated on many occasions, "context" is an important factor of the indecency equation and, to the extent that the overall work as a whole is relevant to the question of "context," it will be considered. [36]

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January 30, 1992). He further added that the term indecent had recently withstood constitutional challenge in the *Dial Information Service* case because the court held that it was "sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs.'" *Id.* (citation omitted).

[31] *See Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 936 n.6 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) and *Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-1541 (2d Cir. 1991).

[32] We decline to adopt Blade Communications' proposal that application of the indecency standard should also take into account particular tiers of service on the cable system. We agree with Alliance's contention in its reply comments that such an approach would be "unworkable" and that access channels may be available on different tiers.

[33] *See Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 933 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[34] This approach was strongly supported by the commenters.

[35] On the broadcast side, we have noted that the Supreme Court does not require, as a constitutional matter, the use of any precise geographic area in evaluating obscene or indecent material, *Hamling v. United States*, 418 U.S. 87, 104-05 (1974), and we have stated that "the determination reached is not one based on a local standard, but one based on a broader standard for broadcasting generally." *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd 930, 933 (1987), *remanded on other grounds Action for Chil dren's Television v. FCC*, 852 F.2d 1332 (1988). We believe that similar considerations are applicable here.

[36] *See, e.g., Infinity Broadcasting Corp., supra.*

**B. Identification by Program Providers of Indecent Programming**

39. Section 10(b) directs the Commission to adopt regulations that require cable operators to block access to indecent programs "as identified by program providers." In the *Notice*, we noted that it is the program provider, not the cable operator, who must determine if a program is indecent and, therefore, must be placed on a blocked channel. We pointed out that the cable operator is prohibited under section 612(c)(2) of the Communications Act from exercising editorial control over the leased access channels (unless under section 10(a) of the new Act it enforces a written and published policy that prohibits indecent programming). We expressed the view that, under these provisions, (and in the absence of a policy authorized by section 10(a)), the cable operator might not have the power to require placement of indecent programming on the blocked channel if the program provider fails to identify the program as indecent or fails to notify the cable operator to that effect.

40. Most commenters, primarily cable operators, agree that producers or programmers should have primary, if not the sole, responsibility to identify programming since they have the best knowledge of the programming. NCTA and several cable operators state that cable operators should not be responsible for the underlying content of such programs but only for failure to block if proper notification is given, unless the operator has actual knowledge that the program is indecent. Others, such as Intermedia, state that because cable operators are also liable for obscene programming, they should be permitted to review or prescreen if they so choose. MPAA, in reply comments, states that lessees should be permitted, but not required, to provide written notice of any programming they believe may be found to be "indecent" by simply requesting carriage on a "blocked" channel.

**Discussion**

41. The legislative history to section 10 indicates clearly that Congress deliberately chose to pattern this section on the statutory scheme applicable to information providers of indecent materials over common carrier telephone facilities. Senator Helms, the amendment's author, stated that "this [blocking scheme] is precisely the same method that Congress used to block dial-a-porn lines" and has been upheld against constitutional challenge.[37]

42. Under the telephone blocking scheme upon which section 10(b) is based, it is the information provider, not the telephone common carrier, that is required to identify whether the information to be transmitted is indecent. *See Report and Order in the Matter of Regulations Concerning Indecent Communications by Telephone Gen. Docket No. 90-64*, 5 FCC Rcd 4926, 4931 (1990). In adopting implementing regulations in the telephone context, we expressly stated that such a requirement imposes merely a minimum burden on the information provider and obviates the need for the carrier to monitor the communication.[38]

43. Similarly, the statutory language of section 10 expressly requires the program provider, not the cable operator, to identify whether a program is indecent and therefore is subject to the blocking requirement. Given this statutory directive, we do not believe section 10(b) requires cable operators to prescreen or review programs on the leased access channels for this purpose.[39] Cable operators thus will not be held liable under section 10 or our rules for their failure to block programming where program providers have failed to provide the required identification of programming that is indecent. Moreover, given the explicit statutory language requiring programmer identification as a prerequisite to the cable operator's blocking obligation (which signifies Congress' clear intention to limit the responsibility of cable operators), a cable operator will not be subject to liability under section 10(b) even if it has a contrary belief that a program not identified by a program provider is indecent. As discussed in para. 75, *infra*, programmers who violate our rules by failing to identify indecent programming will, of course, be subject to appropriate sanctions.

**C. Certification**

44. In the *Notice*, we asked, in conjunction with the identification requirement, whether a cable operator can require program providers to certify that their programming is not indecent or obscene. We assumed that all cable operators could require program providers to certify that their programs do not contain obscene materials.[40]

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[37] *See* 138 CONG. REC. at S646 (daily ed. January 30, 1992).

[38] As noted above, the statutory scheme that governs indecent telephone communications was upheld against constitutional challenge in both *Dial Information Services* and *Information Providers' Coalition*. In the latter case, the court rejected a claim that the indecency identification requirement is an impermissible "prior restraint," stating that "labelling matter as indecent under the statute or regulation does not inhibit its dissemination one iota." 928 F.2d at 878. The court further stated that if regulation of indecent matter is constitutionally permissible, "it inexorably follows that for some regulation of indecent speech to occur, the speech must be identified as indecent." *Id.*

[39] Similarly, we do not believe that section 10(b) itself authorizes cable operators to prescreen. Cable operators may, if they choose, prescreen programming as a means to enforce any cable operator policies adopted under authority of section 10(a). Further, we believe that cable operators with policies prohibiting indecent programming have, under section 10(a), the discretion to block any such programming, rather than banning it completely, and, moreover, they may provide such programming on blocked channels during time periods of their own choosing. In addition, wholly apart from the provisions of sections 10(a) and 10(b), we think thatprescreening by cable operators cannot be prohibited in light of the amendment to section 638 that removes a cable operator's statutory immunity for obscene programs on cable access channels. As noted *infra*, however, we believe that cable operators that do not prescreen, and thus do not have actual knowledge of any obscene programming on leased access channels, are otherwise immune from prosecution for violations of obscenity laws.

[40] As we pointed out in the *Notice*, section 10(d) of the new Cable Act removed cable operators' statutory immunity under federal, state, and local laws for "programming involving obscene materials" on access channels. We agree with Alliance to the extent that it suggests that the language in section 10(d), if read literally, may be too broad to satisfy constitutional standards. The language in 638 should thus be construed to remove immunity only for provision of programming that is unprotected by the first amendment.

45. The majority of commenters supported use of a certification procedure, although some differed as to details that should apply to this process. Other commenters were concerned that requiring certifications could discourage or curtail presentation of live programming on access channels. To alleviate such concerns, NATOA urged the Commission to allow programmers of live formats to certify that they have exercised "reasonable efforts" to ensure that their programs will not contain obscene or otherwise proscribed material. Acton, TCI and Time believe that NATOA's suggestion is reasonable. Some cable operators favor a certification process because it is the least intrusive means of implementing section 10(b). For example, Continental Cablevision argues that, without certification, operators will be forced to adopt a written and published policy and, if so, this could lead to a *de facto* ban on indecent programming. Other cable operators who favor certifications argue that their use should not preclude operators from prescreening or otherwise monitoring programming on the leased access channels.

46. Denver Access, one of the few to express reservations about a certification process for leased access use, argues that certifications can be used in a highly and unnecessarily repressive manner and, therefore, the FCC should permit certifications only under conditions it prescribes and monitors. NATOA states its support for a certification system because it believes that cable operators should not be permitted, much less required, to censor programming. MPAA, in its reply comments, states that lessees should not be required to "certify" that programming is "indecent but, as noted previously, merely request carriage on the blocked channel.

47. Cable operators state that they should be released from liability for carriage of leased access indecent or obscene programming where a programmer has certified that the programming is not obscene or indecent. However, they differ as to the precise form of nonculpability that should attach. For example, some suggest no liability at all in such cases and, therefore, no prosecution at the federal, state, or local level. Others suggest that an affirmative defense should be available or that common law defenses should be available to operators. For example, TCI asserts that there should be an irrebuttable presumption of no knowledge by an operator if a programmer certifies that programming is not indecent or obscene because Congress clearly removed from cable operators an obligation to make independent judgments about programming.

48. Cable operators thus suggest that they should not be held liable for the underlying content of the programs but only for their failure to place programming on blocked channels upon receipt of proper notification. They are almost unanimous in their views that unless they are protected by a certification process, they will be forced to prescreen and censor programming on the leased access channels. Some also suggest that they should have the right to prescreen even if a certification process is adopted, since they are now liable for carriage of obscene materials. Others suggest that they should be permitted to impose reasonable conditions on carriage of programming on leased access channels, including indemnification provisions. Some assert that they should be permitted to deny carriage to a program provider whose certification was false and some maintain they should be permitted to assess monetary penalties. In their view, those who refuse to certify should be denied access.

49. On the other hand, Alliance maintains in reply comments that certification is not necessary to insulate operators from liability, even for obscene programming. Rather, the Commission should state in its final rule that no liability will attach to an operator if a programmer violates both the Commission's rule (by failing to identify indecent programming) and an operator's policy against indecent programming. According to Alliance, there is "simply no need for the Commission to require that programmers certify the content of their programs." As to obscene programming, Alliance points out that, in accordance with Commission precedent governing MDS common carriers, no liability should attach for that programming either, unless a cable operator had actual knowledge that the programming has been adjudicated obscene. In addition, it maintains that a certification requirement might very well be considered vague and, therefore, incapable of withstanding first amendment scrutiny, to the extent that it can be likened to an oath and has the effect of chilling speech by forcing self-censorship. Along this line, MPAA, in reply comments, states that requiring program providers to "certify" in writing would violate the Constitution's fifth amendment.

**Discussion**

50. As indicated above, we think that cable operators can use certification procedures as a means to enforce any policies prohibiting indecent programming that may be established under section 10(a). We further believe that requiring certification is'(0* ( (permissible under section 10(b). We will, therefore, permit cable operators to require certification of program providers relating to both indecent and obscene programming on the leased access channels.[41] Although some commenters state that certification would be burdensome and would serve as a further deterrent to those seeking to use these access channels, we believe that a relatively simple, straightforward certification requirement need not have either of these deleterious effects. Further, certification serves as a reasonable means to avoid any questions that might otherwise arise concerning a cable operator's potential liability under our rules and section 10(b) for failure to block indecent programming identified by program providers. In addition, such a requirement is reasonable since cable operators are no longer statutorily immune from liability for obscene materials carried on leased access channels.[42] We thus believe this approach

[41] Certification does not remove a cable operator's independent right to prescreen, as addressed in note 39, *supra*.

[42] We agree with Alliance, that under prevailing law, cable operators should be held immune from liability where they do not have actual knowledge of leased access use for carriage of obscene programming. Permitting a certification requirement would further assist a cable operator in defending against any potential prosecution. We also believe that Congress, through enactment of section 10, clearly intended that its legislative scheme would prevail over any state or local laws that attempted to prohibit or otherwise regulate indecent programming on leased access channels. Even prior to enactment of section 10, section 612 of the Communications Act was expressly held to preempt state law that prohibited indecent programming on these channels. *See Community Television of Utah v. Wilkinson*, 611 F.Supp. 1099, 1103 (D.Utah 1985), *aff'd*

strikes an appropriate balance between the cable operator's rights and obligations under section 10(b) and (d) and the access provisions of section 612(c)(2).

51. Accordingly, we will allow cable operators to require program providers to certify that their programming is not obscene or indecent or, alternatively, to identify the programming that ish indecent and required to be blocked.[43] Further, a program provider that does not provide a requested certification for its programming will not be entitled to leased access. As suggested by NATOA and endorsed by others, program providers of live programming will be permitted to certify that they have exercised reasonable efforts to ensure that their programs are not obscene (or indecent if provided on a non-blocked channel). As stated above, where a program provider's certification that its program is not indecent is erroneous and the program is not blocked out by the cable operator, the cable operator will not be in violation of our rules and the statute.[44]

### D. Basic Requirements

#### 1. Contents of Certification

52. Commenters suggested different approaches regarding implementation of acertification process. Some argue that the FCC should specify the form or the content of the certification that may be required of the programmer. New York State states the Commission should require more than a conclusory statement by program providers. TCI suggests that the Commission should allow certification procedures to be handled contractually by the parties. Commenters generally said that certification should be in writing.

#### Discussion

53. We decline to specify the precise wording that should be contained in a requested certification. However, for purposes of qualifying as a certification under our rules, we shall require that the certification be made in writing by the program provider. Certification must be made by the person or entity assuming responsibility for the program's content. Thus, certification by an access organization or entity responsible for management of the commercial leased access channels is sufficient if that organization or entity assumes responsibility for the content of the programs intended for commercial leased access. Further, the certification should include the full name, address, and telephone number of such person. We will not require a separate certification for each program.

#### 2. Advance Notice

54. In the *Notice*, we asked for comment "on what would be a reasonable time frame for the required notification by a program provider to the cable operator . . ." We proposed in our rule a seven day advance notice requirement.

55. Commenters differ on what would be a reasonable period for advance notification. Acton suggests a one week period. MPAA, in reply comments, however, states that seven days notice should be the "absolute maximum." Others suggest longer periods ranging from 14 days to 60 days. Time, on the other hand, believes notification should be made at the time of contracting for access. New York State argues, however, that a single, fixed notice period for each program might constitute an unconstitutional burden on the right of leased access programmers and, therefore, a more general, flexible approach might be suitable.

#### Discussion

56. We believe that a maximum of thirty days advance notice prior to the access user's requested time for leased access should be adequate to enable cable operators to comply with the blocking requirement.[45] In our view, a thirty day time period appropriately balances the interests and needs of leased access users and cable operators. We are aware of the desire of some cable operators to have a longer time period in order to prepare cable viewer guides. We believe, however, that a sixty day time frame is too long. Our rule will not, we emphasize, prohibit leased access users from providing earlier notification, especially if they wish their programming to be published in monthly

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*Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). With section 10's enactment, it is even more clear that Congress intended that the clearly defined scheme in section 10(b) should prevail and thus preempt any state laws that otherwise might govern indecent programming on access channels. We therefore interpret section 10(b) of the Act as immunizing cable operators and programmers from liability for indecent programming where they have complied with the section 10(b) requirements.

[43] We do not believe that any certification requirements imposed by cable operators impermissibly violate program providers' rights under the first amendment, as Alliance maintains, or the fifth amendment's "self-incrimination" clause if required in writing, as MPAA contends. Moreover, even assuming some state action were involved, requiring a certification would not constitute a prior restraint on speech and thus would not implicate any first amendment concerns. *See Information Providers' Coalition v. FCC*, 928 F.2d at 878. At the outset, we note that our rules will not require cable operators to use a certification procedure, but simply will permit them to do so. Further, program providers do not incriminate themselves by certifying that their programming is not obscene or indecent. Nor do they do so by identifying programming that is indecent for purposes of its provision on blocked channels, as they face no potential liability under state or federal law for the provision of indecent programming on blocked channels. *See* note 42, *supra*, concerning preemption of state laws governing indecent programming on blocked channels.

[44] Further, as indicated in note 42, *supra*, such cable operators (or programmers) in compliance with section 10(b) are not subject to state laws regarding indecency, which are preempted by the Cable Act's explicit provisions governing indecent programming. Further, where a certification is erroneous, we believe cable operators would also be immune from potential liability under obscenity laws. *See* notes 39 and 42, *supra*.

We will not deny cable operators the right to request indemnification from leased access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program, certified otherwise by a leased access provider. Notwithstanding some commenters' contentions, this is a reasonable term and condition relating to use of leased access channel capacity in light of the removal by Congress in amended section 638 of cable operator immunity for carriage of obscene programming.

[45] A cable operator will, of course, be free to adopt a shorter advance notification time frame if it so chooses.

viewer guides that cable operators provide to their subscribers. Moreover, we are aware that a specific time slot requested may not be available and, therefore, alternative air dates or arrangements may have to be made. In such circumstances, no further notification from the program provider shall be required. We decline to adopt Time's suggestion that notification should be made at the time of contracting since that proposal may unreasonably hamper the flexibility of program providers committed to leased access use over extended periods of time. For the present, a thirty day prior notice requirement seems reasonable. If we later find that this approach is too burdensome for either program providers or cable operators, we can alter it accordingly.

**3. Record Retention Requirements**

57. We sought comment in our *Notice* on whether "a cable operator should be required to retain notifications for a prescribed period of time."

58. Blade Communications argues that cable operators should not be required to retain notifications any longer than the applicable statute of limitations. Cox Cable, however, argues that notifications should not be kept any longer than three or four months while NCTA argues that there should be a short retention period as well as short period for filing complaints under section 612, as amended under the new Cable Act, which provides procedures for expediting disputes relating to leased access. Time argues for an eighteen month period which it states is consistent with other record retention requirements, e.g., section 76.225(c) relating to recordkeeping for commercial limits in children's programs. New York State points out that it requires the entity administering its other access channels to retain records for a two-year period.

**Discussion**

59. We shall require cable operators, consistent with our other cable recordkeeping requirements, to retain copies of program provider identifications and/or certifications for eighteen months from the date of receipt. This will ensure that such information will be available should any disputes arise under section 10(b) or related leased access provisions. As mentioned earlier, the notification or certification shall apply to the leased access user but need not specifically mention each program as long as the access user's notification or certification covers all of the programming intended to be carried on commercial leased access. Program providers will also be required to renew their certifications prior to the expiration of the eighteen month period for programming intended to be shown after that date.

**E. Blocked Indecent Leased Access Programs**

**1. Blocking Mechanisms and Subscriber Access**

60. As noted above, section 10(b) specifically requires cable operators to place all indecent programming on a single leased access channel and to block access to that channel unless the subscriber requests access in writing. In the *Notice*, we stated that "[o]ur proposed regulations would codify these statutory requirements" by requiring cable operators to place such programming "on a single leased access channel, employ appropriate blocking mechanisms, and permit access only if the subscriber so requests in writing." We specifically asked commenters for relevant suggestions or comments "concerning appropriate blocking mechanisms and procedures relating to subscriber access."

61. Cable operators are almost unanimous in holding that the Commission should not prescribe a required method of blocking but should allow maximum flexibility as long as it is effective. Such methods should include scrambling, interdiction (by positive or negative traps), or lockboxes. In addition, Cox Cable states that the cable operator should not have to provide more than one blocked channel. In the same vein, Acton maintains that cable operators should be able to deny carriage if the blocked channel is full, while Time states that the cable operator should be allowed to provide more than one blocked channel if it chooses.

62. MPAA argues, in reply comments, that the Commission should take an expansive view of the "single" channel requirement by not limiting it to a 6 MHz channel standard but should interpret the statute to allow cable operators to provide such programming on multiple compressed channels. Acton also argues that the blocked channel obligation should only arise if an operator chooses to carry indecent leased access programming. TCI maintains that the cable operator should not be required to set aside a channel in advance. Acton also maintains that programmers offering indecent programming should not have a right to insist on the blocked channel option.

63. Acton further states that cable operators should not be required to block the channel on a twenty-four hour per day basis. Many other cable operators similarly state that they should not be required to block more channel capacity than necessary, i.e., the rest of the blocked channel should not be "warehoused" for indecent programming. For example, Continental Cablevision says that many cable systems cannot afford to devote two channels for leased access programming that would otherwise fit on a single leased access channel. It further states that cable operators should be allowed to aggregate and scramble all indecent leased access programming on a single channel. Time argues that, in addition to being allowed to block only during indecent programming, cable operators should be able to limit periods for indecent programming and to choose time slots, and that programmers should not be permitted to change their minds during the contract period requiring channel placement changes. Cox Cable argues that cable operators should not be required, as part of the blocking obligations, to market blocked programming.

64. As for subscriber access, TCI says that the FCC should allow the cable operator to use any reasonable method to notify subscribers about the blocked channel. NCTA believes that subscribers should have sufficient time to request access to that channel in writing and that cable operators should have additional time to unblock that channel for interested subscribers. It therefore states that cable operators should have sixty days to notify subscribers (as well as to establish the channel) from an initial request for airing indecent leased access programming and, thereafter, a minimum of thirty days' notice to satisfy requests for blocking of service. Alliance maintains that subscribers should be able to request unblocking of a blocked channel by telephone after the subscriber has mailed the cable operator a written request and that the Commission should prescribe the form of the request and ensure that the cable operator protects the subscriber's privacy.

**Discussion**

65. We shall allow cable operators to employ any blocking mechanism that they choose -- scrambling, interdiction or any other method, as long as it is effective.[46] We agree that cable operators should not be required to block a leased access channel to be used for carriage of indecent leased access programming until they receive a request for carriage from a provider of indecent programming.[47] Similarly, cable operators should be allowed to use the channel for other non-blocked leased access programming to the extent it is not being used for indecent programming.[48] Thus, we will require that the channel be blocked only during those time periods that indecent leased access programming is being shown.

66. We disagree with those commenters who suggest that cable operators should be permitted, on blocked channels, the additional flexibility to "channel" such programming by scheduling it only at late hours of the evening or other times when children are least likely to be viewing. As we stated in the *Notice*, "[i]nstead of this type of 'safe harbor' approach" that has been applied to broadcasting, Congress appears to have "deliberately chosen" a 'blocking' approach, similar to that under section 223 for indecent telephonic communications.[49] We do agree with Time that cable operators should be permitted, if they so choose, to provide an additional blocked leased access channel for indecent programming if the first channel becomes full.[50]

67. We decline to specify the form of notification about the availability of a blocked channel that cable operators should give to subscribers but we shall require that the subscriber's written request to receive the channel contain a statement that the subscriber is at least eighteen years of age. Cable operators will be required to "unblock" the channel within thirty days after receipt of a written subscriber request. Because it appears contrary to statutory intent, we decline to adopt Alliance's suggestion that "unblocking" should be permitted by telephone call if the subscriber has notified the cable operator in writing to activate his or her ability to have the block lifted. We believe that mere telephonic confirmation is insufficient to ascertain that the recipient is, in fact, at least eighteen years of age.

**2. Time Period for Implementation**

68. We did not specify or recommend in the *Notice* a specific time frame by which cable operators would be required to implement the blocking and associated requirements of section 10(b). Most cable operators argue that a time frame of 180 days following adoption of final FCC rules should be set to allow cable operators sufficient lead time to equip themselves and their customers in order to comply with the new requirements. Additionally, Time advocates that non-addressable cable systems be allowed ten years if they use lockboxes. Cox Cable urges cable operator compliance within 180 days following receipt of a first notification of request for carriage of indecent leased access programming. TCI states that cable operators should be afforded a reasonable time to comply but does not specify a particular time frame. Alliance argues that cable operators will need at least 120 days before they can implement the Commission's final rule but that the Commission should clarify that, during the interim period, the provisions of section 10 are to be stayed. MPAA states that an acceptable time frame for implementation would be 120-180 days from the date the final rules become effective.

**Discussion**

69. We are aware that implementation of the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems and that the new requirement may require considerable adjustments by some cable systems in terms of rearranging existing services to accommodate a single leased access channel of indecent programming. In addition, the new regulations will require cable operators to establish and administer new procedures for subscriber notification of the availability of this new channel and for the processing of requests of leased access users and of subscriber requests for this channel, etc. We are also aware of the efforts that may be involved for those systems that require trapping devices to circumscribe access to these services.

70. In view of the foregoing considerations, we will require that cable operators have in place blocking implementation mechanisms and procedures within 120 days of the date of publication of the new regulations in the Federal Register so that thereafter they will not carry programming identified as indecent on non-blocked channels and will be able to accommodate any request for carriage of indecent programming on a blocked leased access channel within 0 days after its receipt. The 120 day period should provide cable operators sufficient time within which to make technical arrangements, inform subscribers of the new leased access blocking requirement and afford subscribers adequate time to notify the cable

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[46] We have already addressed in paras. 12-17, *supra*, the mandatory "blocking" approach versus section 624's voluntary "lockbox" approach. Nevertheless, we think it would be permissible to place all indecent leased access programming on a single channel and use lockboxes as a blocking mechanism, so long as the blocking is accomplished in a non-voluntary manner such that access to the channel is precluded unless and until subscribers request access in writing. We believe this approach would satisfy the plain language of the statute (requiring subscribers to gain access by making requests in writing) and the statute's clear intent that cable operators, not subscribers, be responsible for initial blocking.

[47] As discussed below, however, operators must have the capability to block such a channel within the implementation time frame specified in our rules.

[48] As suggested by one commenter, the "blocked" channel shall be counted as part of the cable operator's obligation to provide leased access capacity under section 612, as amended by the new Cable Act.

[49] However, as previously indicated, *supra* note 39, we believe that cable oprators with written and published policies issued pursuant to section 10(a) have authority under that section to block indecent programming and to schedule it as they please on blocked channels.

[50] We decline to address at this time whether operators that do not have a written and published policy under section 10(a) might be required to provide an additional blocked channel in the event a single channel is filled. If and when that circumstance arises, we can examine that question in a concrete factual setting.

operator in writing if they wish to receive any programming on the channel when, and if, it becomes available on the system.[51]

71. This, or similar measures taken during the transition period,[52] should also enable cable operators to approximate the number of subscribers initially interested in receiving the channel, which should assist in technical implementation of the blocked channel. At the expiration of the 120 day period, cable operators subject to section 10(b) will be required to place indecent programming on a blocked channel. This means that, no later than 30 days prior to the expiration of the 120 day period, programmers must identify any programming that is indecent and which is intended to be carried on the 121st day of the time period.

72. We believe that these time frames are reasonable and are generally consonant with the time frame requested by most of the parties in their comments. We note that cable operators have been on notice of the statute's requirement since the date of enactment of the new Cable Act, October 5, 1992. We further note that many cable systems have existing technology in place in various degrees for use in providing other services that can be adapted toward fulfilling these requirements. Thus, even though the implementation period may not be as long as many cable operators would prefer, we believe it is sufficient.

## VI. Resolution of Disputes under Sections 10(b)

73. There was a broad range of comment over the forum and the manner in which disputes relating to indecent programming on leased access channels should be handled. Some comments specifically addressed procedures for the leased access channels while other comments, particularly from access groups, were directed solely at the public, educational, and leased access channels on cable systems.[53] Time suggested that such disputes should be resolved locally, preferably in court, while others, such as Cox Cable, contend that the Commission is the proper forum for resolution of disputes. NCTA and others suggest that the Commission should adopt expedited resolution procedures consonant with the new provision in amended section 612 (c)(4)(iii) that requires establishment of "procedures for the expedited resolution of disputes concerning rates or carriage under this section." Intermedia argues that the Commission should exercise exclusive jurisdiction, particularly over prior restraint issues and disputes.

74. Denver Access maintains that disputes should be appealable to the Commission or another neutral adjudicator. NATOA maintains that disputes should be resolved by the courts because, ultimately, they must decide the constitutional issues. Alliance maintains that without procedural safeguards applicable to prior restraints on speech, the statute and implementing regulations cannot withstand constitutional scrutiny.

### Discussion

75. We do not envision disputes arising from the content of programs on the leased access channel except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent. In view of the fact that Congress explicitly required us to adopt regulations implementing section 10(b), we believe that, in such instances, we are obligated to specify procedures for resolution of disputes relating to section 10(b)'s implementation. Therefore, where such disputes arise (e.g., there is an allegation that a program provider failed to comply with the new program identification rules), we will entertain special relief petitions under section 76.7 of our rules, 47 C.F.R. §76.7, from cable operators in accordance with the existing procedures we have established.[54] Similarly, we will entertain complaints from subscribers in accordance with our existing complaint procedures. If the petition or complaint is meritorious, we will then take appropriate action, based upon the circumstances, e.g., issue a warning or a notice of apparent liability for violation of the statute and/or Commission rules, or denial of leased access to a program provider in the future.[55]

## VII. Final Regulatory Analysis Statement

76. *The Need and Purpose of this Action.* The regulations in this *First Report and Order* are intended to implement that part of Section 10 of the Cable Consumer Protection and Competition Act of 1992 that directs the Commission to adopt regulations designed to limit children's access to indecent programming on commercial leased access channels. The regulations accomplish this by requiring cable operators (which do not voluntarily prohibit indecent

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[51] As we noted earlier, subscribers should notify the cable operator in writing at least 30 days prior to the date they wish to receive the service and the notification should include a statement that the subscriber is at least eighteen years of age.

[52] Unless cable operators have a written and established policy of prohibiting indecent leased access programs adopted under section 10(a) of the new Cable Act, they will not be permitted to prohibit indecent programming on the leased access channels during the transition period to the blocking approach. We decline to stay the provisions of section 10(a), as requested by Alliance, because we are not empowered to stay statutory provisions and, moreover, both section 10(a) and section 10(d) are self-executing provisions that became effective 60 days after enactment of the new Cable Act on October 5, 1992. We also shall not stay the effectiveness of the new rules adopted under section 10(b) pending court review, as requested by Alliance.

[53] As noted previously, that part of this rule making addressing restrictions on the public, educational, and leased access channel will be addressed at a later date in a separate *Report and Order*. Accordingly, those comments will be considered therein.

[54] Congress, in section 9 of the new Cable Act, requires us to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section." We believe that Congress intended by this provision to ensure that the rights of leased access users to carriage or reasonable rates under section 612 of the Communications Act would not be unduly prejudiced pending resolution of such disputes. To the extent that the existing carriage rights of access users may be affected in the interim pending resolution of a dispute under section 10(b) of the new Cable Act, we will apply these expedited procedures.

[55] To the extent other disputes arise between the cable operator and program provider, they can also be handled, as appropriate, under the special relief provisions of section 76.7 of our rules, 47 C.F.R. §76.7, particularly where they involve other provisions of amended section 612 of the Act relating to rates, terms, and conditions of leased access use.

programming) to place indecent programming, as identified by program providers, on a "blocked" leased access channel and restricting subscriber access to this channel unless specifically requested in writing by a subscriber.

77. *Summary of Issues Raised By the Public Comments in Response to the Initial Regulatory Flexibility Analysis.* Boston Community Access commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on access administrators, access users, and others, their comments were not specifically directed to the Initial Regulatory Flexibility Analysis.

78. *Significant Alternatives Considered and Rejected.* In this *First Report and Order,* we have considered the most efficacious manner to implement the section 10's provisions relating to indecent programming on leased access channels and in the least burdensome manner that is consistent with the statute's aims. To the extent that Boston Community Access' comments, noted above, are directed to adoption of restrictions relating to the public, educational, and governmental access channels, they will be addressed in a subsequent *Report and Order.* To the extent they are intended to address leased access channel restrictions, we have attempted to minimize the burdens on leased access program providers by not requiring notification as to each individual program provided by them and by requring such notifications only by those responsible for the content of the programming. No other significant alternatives consistent with the aims of the statute were presented.

**VIII. Conclusion**

79. Our purpose has been to implement the provisions of section 10(b) which, in accordance with the will of Congress, are intended to safeguard the well-being of children in our society, a compelling governmental interest, by reducing their exposure to indecent programming on commercial leased access channels. By the same token, we have sought to protect the constitutionally protected rights of others to distribute, and receive access to, such programming on cable television. We believe that the regulations we have adopted strike an appropriate balance between these aims.

**IX. Ordering Clauses**

80. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as set forth in Appendix A below, effective 120 days from the date of publication in the *Federal Register.*

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**APPENDIX A**

**AMENDATORY TEXT**

**PART 76 -- CABLE TELEVISION SERVICE [AMENDED]**

1. The authority citation of Part 76 is amended to read as follows:

**Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Sec. 612, as amended, 106Stat. §1460, 47 U.S.C. §532**

2. Part 76 is amended by adding the following subpart:

Subpart L -- Cable Television Access

**§76.701 Leased Access Channels**

(a) Notwithstanding 47 U.S.C. §532(b)(2) (Communications Act of 1934, as amended, Section 612), a cable operator, in accordance with 47 U.S.C. § 532(h) (Cable Consumer Protection and Competition Act of 1992, §10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator that does not prohibit the distribution of programming in accordance with paragraph (a) shall place any leased access programming identified by program providers as indecent on one or more channels that are available to subscribers only with their prior written consent as provided in paragraph (c).

(c) A cable operator shall make such programming available to a subscriber within 30 days of receipt of a written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old; a cable operator shall terminate a subscriber's access to such programming within 30 days from receipt of a subscriber's request.

(d) A program provider requesting access on a leased access channel shall identify for a cable operator any programming that is indecent as defined in paragraph (g). Such identification shall be in writing and include the full name, address, and telephone number of the program provider and a statement that the program provider is responsible for the content of the programming. A cable operator may require that such identification be provided up to 30 days prior to the requested date for carriage. A program provider requesting carriage of "live programming" on a leased access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented. A cable operator will not be in violation of paragraph (b) if it fails to block indecent programming that is not identified by a program provider as required in paragraph (d).

(e) A cable operator may request a program provider to certify that the programming intended for leased access is not obscene programming or indecent programming subject to the requirement of paragraph (b). A cable operator may request a program provider of "live programming" to certify that reasonable efforts will be